BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CINDY GARRIOTT, Claimant, vs. MENARD, INC., Employer, and XL INSURANCE AMERICA, INC., Insurance Carrier, Defendants.	File No. 20700424.01 ARBITRATION DECISION Head Note No.: 1108

STATEMENT OF THE CASE

The claimant, Cindy Garriott, filed a petition for arbitration and seeks workers' compensation benefits from Menard, Inc., employer, and XL Insurance America, Inc., insurance carrier. The claimant was represented by Edward Noethe. The defendants were represented by Michael Jensen.

The matter came on for hearing on August 1, 2022, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa via Zoom videoconferencing system. The record in the case consists of Joint Exhibits 1 through 2[1]; Claimant's Exhibits 1 through 9; and Defense Exhibits A through E. The claimant testified at hearing. Debra Hoadley served as the court reporter. The matter was fully submitted on August 8, 2022.

ISSUES AND STIPULATIONS

The parties submitted a hearing report which was accepted at hearing. The dispute in this case revolves around whether the claimant sustained an injury which arose out of and in the course of her employment on November 27, 2018, and if so, the benefits she is entitled to. No affirmative defenses were asserted.

[1] Claimant's Exhibit 1 was admitted into evidence by mistake. It is a First Report of Injury (FROI) which is inadmissible under Iowa Code Section 86.11 (2021). This evidence was not reviewed or considered in this decision.

The parties did stipulate to a number of issues. Those stipulations were accepted at the hearing and are deemed binding upon the parties.

FINDINGS OF FACT

Claimant Cindy Garriott was born in 1958. She resides in Bellevue, Nebraska. She graduated from high school and has some college. She testified live and under oath at hearing. I find her testimony to be credible. She did appear to be somewhat nervous at hearing. Her answers, however, were simple and straightforward. Her testimony was consistent with other portions of the record and is largely unrebutted. She was a good historian. There was nothing about her demeanor which was inappropriate or otherwise caused any concern for her truthfulness.

Ms. Garriott began working at Menard, Inc. in 2016 as a morning stocker. She was a good worker and it appears she was highly motivated. On November 27, 2018, Ms. Garriott testified that she tripped into a pallet at work. She testified she fell. She experienced pain in her left elbow and left shoulder. She testified that she reported this incident to Matt Miller for the employer. Ms. Garriott testified she thought she was going to get better so she initially did not pursue treatment for a period of approximately four months. Prior to her work injury, she was not having left shoulder symptoms.

According to the medical file, Ms. Garriott was receiving treatment for another work injury at this time. Specifically, between December 2018 and March 2019, she was receiving medical treatment for a left wrist and hand condition from a work injury through Caliste Hsu, M.D., which resulted in a surgery. (Joint Exhibit 2, pages 1-11) On April 4, 2019, Daniel Larose, M.D., a colleague of Dr. Hsu, documented the following:

> History: This is a 60-year-old ambidextrous woman complaining of left shoulder pain. This started when she landed on her left elbow at work. Her elbow went through a pallet and she had immediate left shoulder pain. This injury was in November of 2018. Her main discomfort is on active abduction. It does not appear that she had any treatment for this condition. She recently in January had surgery by Dr. Hsu, carpal tunnel release, first extensor compartment release, and repair of the volar plate of the PIP left 5th finger. This was not addressed by me today. Medications and review of systems reviewed. She denies neck pain. There has been no change since December of 2018.

(Jt. Ex. 2, p. 13) Dr. Larose diagnosed left shoulder rotator cuff syndrome and recommended physical therapy.

Ms. Garriott started physical therapy for her shoulder condition on April 9, 2019. (Jt. Ex. 1, p. 18) She continued physical therapy through the month of April. She followed up with Dr. Larose on April 30, 2019, and then underwent an MRI of the left shoulder on May 22, 2019. The MRI showed the following:

IMPRESSION

Tendinosis of the rotator cuff tendon complex. There is articular-sided fraying and partial-thickness tearing of the supraspinatus tendon. This is noted centrally and extends anteriorly. There is tendinosis with degeneration and articular-sided fraying of the subscapularis tendon distally. There is no complete, retracted rotator cuff tendon tear. These changes are age indeterminate.

Degenerative osteoarthritic change of the acromioclavicular joint. There is undersurface osteophyte/fibrous callus formation which contacts and impresses the supraspinatus tendon. There is subdeltoid bursal inflammation. These changes are chronic.

Tendinosis of the long head of the biceps tendon. There is minimal fraying of the tendon as it curves into the bicipital groove. There is fluid distending the biceps tendon sheath suggesting biceps tenosynovitis of the left shoulder. These changes are likely chronic.

Small glenohumeral joint effusion of the left shoulder.

(Jt. Ex. 2, p. 18) Dr. Larose reviewed the MRI and stated the following. "There is no rotator cuff tear. There is some AC arthritis and some mild tendinosis. Suspicion of frayed articular side of the supraspinatus." (Jt. Ex. 2, p. 19) He provided a steroid injection on that date. It appears he also placed her on light-duty at that time. (Jt. Ex. 2, p. 26) This record corresponds with Ms. Garriott's testimony that she moved to a cashier position instead of stocking.

She last followed up with Dr. Larose in June 2019. (Jt. Ex. 2, p. 20)

The patient has 7 months of discomfort since injury, extensive conservative care, and she is not getting better. We recommend an exam under anesthesia, arthroscopy, subacromial decompression, and coplaning of the clavicle if indicated, careful inspection of the biceps and possible biceps tenodesis and careful inspection of the rotator cuff with probable mini open rotator cuff repair.

(Jt. Ex. 2, p. 20)

Ms. Garriott has not received this treatment. She has just been living with her symptoms. She has continued to work and has received pay increases. (Def. Ex. E) On September 1, 2021, Dr. Larose prepared a report for claimant's counsel essentially outlining what was in his medical notes set forth above. He set forth his opinion that he recommended surgery in June 2019 and stated "the patient did not follow up with the surgery and did not follow up with me. Therefore I have no opinion on her prognosis." (Cl. Ex. 2, p. 1)

Ian Crabb, M.D., performed an independent medical examination for the employer. He prepared a report dated October 29, 2019, summarizing his opinions. He documented her ongoing symptoms and complaints. (Def. Ex. A, p. 6) After reviewing records and examining Ms. Garriott, he opined that her "diagnosis is a personal medical condition and is not directly related to her employment with Menards." (Def. Ex. A, p. 9) He did not address whether her work injury materially aggravated her condition. He assigned no impairment or restrictions to her condition. Based upon this report, defendants apparently denied the claim.

In July 2021, Sunil Bansal, M.D., examined Ms. Garriott for an independent medical examination. He reviewed appropriate records, interviewed Ms. Garriott and examined her. (Cl. Ex. 3, pp. 1-5) Dr. Bansal diagnosed left rotator cuff tendinosis. (Cl. Ex. 3, p. 5) "This mechanism of tripping and falling onto her left elbow into the pallet with the vector of force proximally, coupled with a clinical presentation of immediate left shoulder pain, is consistent with her rotator cuff tendinitis." (Cl. Ex. 3, p. 6) He opined that she could still be a surgical candidate, or opt for further "intermittent steroid injections to the left shoulder for maintenance." (Cl. Ex. 3, p. 6) He assigned an impairment rating of 6 percent of the left upper extremity for her shoulder condition and 2 percent of the left upper extremity for her elbow weakness. (Cl. Ex. 3, p. 7)

At hearing, Ms. Garriott testified that her shoulder symptoms are getting worse.

CONCLUSIONS OF LAW

The first question is whether the claimant sustained an injury which arose out of and the course of her employment on November 27, 2018.

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes

of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

The evidence in the record is quite clear that Ms. Garriott did, in fact, sustain an injury which arose out of and in the course of her employment on November 27, 2018. She reported it immediately, but she did not seek care. The defendants point out that Ms. Garriott has sustained other injuries at work and on each of those occasions she sought treatment. None of this, of course, changes the fact that she did, in fact, sustain a work injury.

The next question is causal connection.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

I find that the greater weight of the evidence supports a finding that Ms. Garriott has sustained both temporary and permanent disability. This is based upon her testimony, as well as the contemporaneous records of Dr. Larose (Jt. Ex. 2) and the

physical therapist (Jt. Ex. 1), the medical opinion of Dr. Larose (Cl. Ex. 2) and the expert opinion of Dr. Bansal (Cl. Ex. 3, p. 7). Dr. Larose recommended a surgical procedure in 2019. It is unclear whether that procedure is still recommended. Dr. Bansal opined that in the absence of further treatment, she is at maximum medical improvement for her condition and it is deemed permanent. It is unclear whether she will receive any further treatment as of the date of hearing.

The defendants secured a report from Dr. Crabb. I do not find his opinions convincing. It does not appear that he used the correct legal standard for medical causation. He simply opined that her condition was degenerative and was "not directly related to her employment at Menards." He did not answer the question whether her condition was aggravated by the work injury.

The next issue is the extent of permanency. It is noted herein that the defendants argue that the claimant is not at maximum medical improvement because she still wants surgery. It is unknown, however, whether the surgery recommended by Dr. Larose in 2019 is still advisable. She will need to follow up with him. Based upon the record as it stands at the time of hearing, Ms. Garriott's condition is stable and permanent.

I find the claimant suffered a disability to her right "shoulder" under Iowa Code section 85.43(2)(n). Having found that the disability is a scheduled member evaluated under Section 85.34(2)(n), the next issue is to assess the degree of disability to the claimant's right shoulder.

> In all cases of permanent partial disability described in paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment pursuant to paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity.

Iowa Code section 85.34(2)(x) (2019).

Thus, the law, as written, is not concerned with an injured worker's actual functional loss or disability as determined by the evidence, but rather the impairment rating as assigned by the adopted version of the AMA Guides. The only function of the agency is to determine which impairment rating should be utilized.

By a preponderance of evidence, I find the claimant has sustained a 6 percent impairment to her left shoulder pursuant to the AMA Guides, Fifth Edition. Consequently, I conclude that claimant is entitled to 6 percent of 400 weeks or 24

weeks of compensation, commencing the date she reached maximum medical improvement, June 20, 2019. The parties have stipulated that no weekly compensation benefits have been paid on this denied claim.

The next issue is future medical expenses.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code section 85.27 (2013).

The claimant testified she would like to have surgery as recommended by Dr. Larose in 2019. I find that this treatment recommendation is stale. I will not order it. I do find that claimant is entitled to medical care for her work-connected disability. Defendants shall authorize a return visit to Dr. Larose to update any current treatment recommendations. If this is not possible for any reason, the defendants shall name a new authorized treating provider within a reasonable time.

The final issue is IME costs and case expenses.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated “permanent disability” and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Iowa Code section 86.40 states:

> Costs. All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

> Costs. Costs taxed by the workers’ compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential

> depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010) The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

Defendants are responsible for the costs, including the IME expense of Dr. Bansal in the total amount of $2,385.70.

ORDER

THEREFORE IT IS ORDERED

Defendants shall pay the claimant twenty-four (24) weeks of permanent partial disability benefits at the rate of four hundred seventeen and 12/100 ($417.12) per week commencing June 20, 2019.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall authorize reevaluation and treatment by Dr. Larose, or another physician if Dr. Larose is unavailable, consistent with this decision.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Costs are taxed to defendants in the amount of two thousand three hundred eighty-five and 70/100 dollars ($2,385.70).

Signed and filed this __16th__ day of December, 2022.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Edward Noethe (via WCES)

Michael Jensen (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.